SUPREME COURT, U. S.

DEC 13 1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 835

D. K. OVERMYER WAREHOUSE CO., INC., an Ohio corporation, GREEN & WHITE CONSTRUCTION CO., INC., a Delaware corporation, and LIBERTY MUTUAL INSURANCE CO., a Massachusetts corporation,
Petitioners

v.

FLORIDA STEEL CORPORATION, a Florida corporation,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, MIAMI, FLORIDA

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December 13, 1968

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v.

FLORIDA STEEL CORPORATION, a Florida corporation,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, MIAMI, FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of Florida, Third District, dismissing as frivolous petitioner's appeal from an adverse judgment for some $25,000 rendered by the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County.

On November 4, 1968, the Supreme Court of Florida, declined a petition for certiorari, by a court which divided 2 to 1.

OPINIONS BELOW

No opinion was written by any of the Florida courts.

JURISDICTION

The order of the Supreme Court of Florida denying certiorari was entered October 2, 1968, and a motion for rehearing was thereafter denied on October 31, 1968. The jurisdiction of this Court is invoked under Title 28 U.S. Code, § 1257(3).

QUESTION PRESENTED

Since the Florida Constitution gives an appeal as a matter of right, may the appellate court strike from appellant's brief copies of a public ordinance involved in the appellate argument, and then without notice or hearing summarily dismiss the appeal as frivolous?

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amendment 14: . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Constitution of 1885 (Fla. Stat. Ann. 1967): Art. 5, § 5 (3) *Jurisdiction.* Appeals from trial courts in each appellate district . . . may be taken to the court of appeal of such district, as a matter of right, from all final judgments or decrees except those from which appeals may be taken direct to the Supreme Court or to a circuit court.

STATUTE INVOLVED

Pertinent excerpts from the South Florida Building Code, adopted by the Board of County Commissioners, Dade County, Florida, are reproduced in the Appendix to this petition (5a-10a).

STATEMENT

Petitioner Green & White Construction Company had contracted to build a warehouse in Dade County, Florida, for the Overmyer Warehouse Company of Ohio. Liberty Mutual was the surety on the construction contract.

Respondent Florida Steel Corp. furnished the open-web steel joists for the roof, and for this material brought suit in the Circuit Court of Dade County for the invoiced amount of approximately $22,000, plus attorneys' fees.

At the trial which was conducted before a judge without a jury, an issue of fact as to the existence of defects was raised by the defendants which claimed a deviation from the required straightness and failure to meet the standards of vertical alignment. The trial court rendered judgment for the plaintiff and defendants appealed. Appellants contended that the Building Code (a municipal ordinance) automatically was embraced in the contract between the parties and that the materials furnished could not be approved or evaluated except by reference to this Building Code.

In order to document this argument appellants attached to the brief photocopies of the Building Code showing it was adopted by the County Commissioners for application throughout Dade County (App. 5a-7a). Since that Building Code incorporated by reference the specifications of the American Institute

of Steel Construction, the pertinent part of those specifications was likewise attached to the brief as an exhibit (App. 9a). Those specifications establish the tolerances for straightness and over-all deviations, describing the limits of acceptability and these were also offered as an exhibit.

The standard specifications used by the Steel Joist Institute and the American Institute of Steel Construction were attached, with a photograph showing the placement of these structural members, purely as a matter of illustration.

Appellants sought to indicate the importance of having these steel members properly fabricated in order "to provide for the safety of workers and others during these operations and to regulate the equipment, material, use and occupancy of all buildings" as spelled out in the "purpose clause" of the Building Code (App. 7a).

Accordingly, an authoritative engineering study, "Building Failures, Case Studies in Construction and Design" by Thomas H. McKaig, Consulting Engineer (McGraw-Hill, 1962), was reproduced in part. A study was noted of the collapse of the Brooklyn Theatre, causing the deaths of seven men. The indications were that the failure of one joist would produce a domino effect pulling down the others in rapid succession. Appellants argued that this public safety standard of municipal law of the forum, employed in this Building Code, could not be ignored by the parties, and by the trial court. The Court of Appeal was asked to remand for findings as to whether or not the joists in question complied with the law, or violated the law and constituted a hazard to the public

safety, hence did not constitute recoverable performance of plaintiff's contract.

No decision on this subject was rendered, but the plaintiff moved to strike the brief because the exhibits attached had not been presented to the trial court. This was joined with a motion to quash the appeal. The Court of Appeal ordered the exhibits stricken, but denied the motion to quash the appeal (R. 96). Thereafter, without notice or hearing on the matter, the Court of Appeal reversed its earlier order denying the motion to quash, and announced that since the exhibits were not before the Court, the appeal was frivolous and it was accordingly dismissed (R. 98). The Supreme Court of Florida denied certiorari by a divided court (R. 105) subsequently denying a petition for rehearing on October 31, 1968 (R. 106).

REASONS FOR GRANTING THE WRIT

The Florida Court Has Unconstitutionally Denied Petitioners the Appeal of Right Guaranteed by the Florida Constitution, and Routinely Afforded to Florida Citizens, Thereby Denying Petitioners Due Process of Law and Equal Protection.

After the Court of Appeal had granted a motion to strike the exhibits from appellants' brief, but declined to strike the brief and dismiss the appeal, that same court, without notice or an opportunity to be heard, summarily dismissed the appeal because the argument was not supported by the exhibits. This would be tantamount to taping a prisoner's mouth shut and then finding him guilty because he had offered no defense; or emasculating a party and rendering judgment against him by default because his voice had not been heard to state a defense. Possibly it would

be similar to amputating a party's legs and then dismissing his case for lack of standing.

Examination of the Florida Constitution of 1885 (supra) shows that the appeal is a matter of right. This right obviously cannot be arbitrarily and summarily denied without notice and a hearing, after an explicit decision to the contrary, when the appellate court itself has altered the basis upon which the appeal is brought.

It seems clear that the Court of Appeal should have examined the papers, weighed the arguments pro and con, with or without the exhibits, and performed its constitutional duty under Florida law by reviewing the proceedings below and ordering such judgment as justice requires. To strike the exhibits and then hold the argument frivolous is indeed making a mockery of the right of appeal, since this case raised serious questions of a justiciable nature. The record will show that the application for rehearing in the Court of Appeal asserted the right to an adjudication on appeal under the Constitution of the State of Florida and the Constitution of the United States (App. 3a). The same position was taken before the State Supreme Court in connection with the petition for certiorari and the petition for rehearing following denial (App. 2a).

The Florida Supreme Court has made it plain that in such cases as this, presenting "a substantial justiciable question" the appeal may not be dismissed as frivolous even though reversal of the lower court is unlikely. *Treat* v. *State ex rel. Mitton,* 121 Fla. 509, 163 So. 883, 884 (1935), and it seems to be thoroughly accepted that a case should not be dismissed as frivolous except

in extreme circumstances. *Moist* v. *Belk,* 380 F.2d 721 (7th Cir. 1967), *cert. denied,* 389 U.S. 960 (1967); *Cohen* v. *Curtis Publishing Company,* 333 F.2d 974 (8th Cir. 1964), *cert. denied,* 380 U.S. 921 (1964).

It is submitted as fundamental that due process of law and equal protection ordained under the Fourteenth Amendment are essentially requirements of fairness, not only for citizens of Florida, but also for those who come from all the other States of the Union. When they have court proceedings to be heard it seems fundamental that those proceedings should go forward on the basis of the documents as presented and not as eviscerated and castrated in summary session without notice and without hearing. Right or wrong the appellant is exercising a right given by the Florida Constitution and the Federal Constitution which requires that his enjoyment of that right be identical in scope with every other litigant in the same posture. At the very moment when the Court of Appeal ordered the exhibits deleted from the brief, it declined to quash the brief itself and dismiss the appeal. Subsequently it did exactly that, without notice or an opportunity to be heard.

It is thoroughly well recognized that due process of law does not require appellate review, *McKane* v. *Durston,* 153 U.S. 684 (1895), but when the Constitution of the State of Florida gave that right of appeal as a matter of right, it cannot be lawfully granted to some and withheld from others, such as these petitioners. "It must meet the requirements of due process and the equal protection clause." *Chapman* v. *State of Texas,* 242 F. Supp. 378, 381 (S.D.Tex. 1965); *Donnell* v. *Swenson,* 288 F. Supp. 317 (W.D.Mo. 1966). *Cf. Griffin* v. *Illinois,* 351 U.S. 12 (1956).

The rule was very neatly put in *United States* v. *Smith,* 200 F. Supp. 885, 919 (D.Vt. 1961) where the Court said:

> While a state is not required by the Constitution of the United States to provide appellate courts or a right to appellate review at all, once a state establishes a system of appellate review —particularly in criminal cases—then " * * * at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like [petitioner] from invidious discriminations." citing *Griffin* v. *Illinois, supra.*

While it must be confessed this issue seems to be raised in criminal cases, as shown by the cases, the rules are the same for civil matters where constitutional principles are involved.

CONCLUSION

The District Court of Appeal of Florida denied petitioners' right of appeal guaranteed by the Florida Constitution, without notice or hearing. Petitioners have been denied due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment, U.S. Constitution. It is prayed the Court grant certiorari and remand the cause to the District Court of Appeal of Florida for the Third District with directions to hear and decide the appeal on the merits.

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New York, N. Y.

December 13, 1968

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1968

WEDNESDAY, NOVEMBER 6, 1968

Case No. 67-1035

D. H. OVERMYER WAREHOUSE COMPANY, an Ohio corporation, ET AL., *Appellants,*

v.

FLORIDA STEEL CORPORATION, a Florida corporation, *Appellee.*

This cause having come before the court on appellants' motion to stay mandate and supplemental motion and appellee's responses thereto and on consideration thereof after the Supreme Court of Florida has held it has no jurisdiction to review on Certiorari this Court grants a 30 day stay for the filing of a petition for certiorari in the U. S. Supreme Court, and if so filed, then until the matter is finally disposed of by that court.

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A.D. 1968

THURSDAY, OCTOBER 31, A.D. 1968

On consideration of the Petition for Rehearing filed by Attorneys for Petitioners,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

IN THE SUPREME COURT OF FLORIDA

Case No. 37,595

Petition for Rehearing

Petitioners respectfully file this Petition for Rehearing on the grounds that the Court overlooked or failed to recognize that the District Court of Appeal in its decision erroneously concluded that Petitioners' appeal in that Court was based solely upon evidentiary material attached to the appeal brief as exhibits, whereas said exhibits contained (for convenience of the Court) matters of law of which the Court has judicial knowledge; and that the quashing of the appeal without a hearing effectively denied Petitioners their right of an appeal guaranteed by the Constitutions of Florida and the United States; and that the decision was in direct conflict with a long line of decisions in this Court holding that litigants have a right of appeal guaranteed by the Constitution.

WHEREFORE, Petitioners respectfully move for a rehearing, and upon rehearing, to consider whether Petitioners have the right to be heard on the merits of their appeal.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1968

WEDNESDAY, JUNE 26, 1968

Counsel for appellants having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

Application for Rehearing

Appellants respectfully move for a rehearing in this cause on the following grounds:

1. The Court by omission or oversight failed to recognize that the matters and things attached to the Brief as exhibits were not evidenced for consideration in the cause but consisted of ordinances, regulations or laws of which the Court should take judicial knowledge.

2. The Court by omission or oversight failed to recognize that Appellants are entitled to an adjudication of their asserted rights under the applicable ordinances, regulations and laws of which this Court should take judicial knowledge, and that denial of the rights of Appellants to an adjudication of said rights is a denial of right of appeal guaranteed by the Constitution of the State of Florida and the Constitution of the United States of America.

3. The Court by omission or oversight failed to recognize that the Court's refusal to render an adjudication of the rights asserted by Appellants is a denial of due process

of law guaranteed by the Constitution of the State of Florida and the Constitution of the United States of America.

4. The Court by omission or oversight failed to recognize that the ordinances, regulations and laws relied upon by Appellants became a part of the contract between the parties as a matter of law and that denial of Appellants' asserted rights, or a refusal to consider Appellants' claims is violative of constitutional due process of law.

Dated this 7 day of June, 1968.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1968

WEDNESDAY, MAY 29, 1968

The court having examined the briefs submitted and it appearing that the court has heretofore considered a motion of the appellee to strike appellants' brief and has stricken the exhibits attached thereto as not being a part of the record on appeal, and it further appearing that inas much as said exhibits are not a part of the record on appeal, the points presented upon appeal may not be considered by the court; therefore, the appeal is frivolous, whereupon, this appeal is quashed.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1968

WEDNESDAY, MARCH 27, 1968

This cause having come on for hearing on appellee's motion to strike appellants' brief, and the court having considered same, it is ordered that said motion is granted in part, as to the challenged exhibits attached to appellant's brief and such exhibits are hereby stricken.

It is further ordered that appellee's motion to quash appeal is denied.

The South Florida Building Code

1957 EDITION

Adopted October 29, 1957
BOARD OF COUNTY COMMISSIONERS,
Dade County, Florida

Copyright applied for 1957, by
BOARD OF COUNTY COMMISSIONERS,
Dade County, Florida

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Ordinance No. 57-22

AN ORDINANCE TO BE ENTITLED

AN ORDINANCE ADOPTING THE SOUTH FLORIDA BUILDING CODE FOR BOTH THE INCORPORATED AND UNINCORPORATED AREAS OF DADE COUNTY, SUCH CODE CONSISTING OF FOURTEEN PARTS ENTITLED AS FOLLOWS: ADMINISTRATIVE, DEFINITIONS, REQUIREMENTS BASED ON OCCUPANCY, REQUIREMENTS BASED ON LOCATION IN FIRE

ZONES, TYPES OF CONSTRUCTION, ENGINEERING AND CONSTRUCTION REGULATIONS, DETAILED REGULATIONS, FIRE-RESTRICTIVE STANDARDS AND PROTECTION, SIGNS, AWNINGS, CANOPIES AND TENTS, ELECTRICAL, PLUMBING AND GAS, MECHANICAL VENTILATION, SWIMMING POOLS AND CERTAIN ADDENDA ATTACHED THERETO; AND REPEALING ALL COUNTY AND MUNICIPAL ORDINANCES AND RESOLUTIONS, MUNICIPAL CHARTERS, SPECIAL LAWS, AND GENERAL LAWS WHERE AUTHORIZED BY THE CONSTITUTION IN CONFLICT WITH THIS ORDINANCE.

BE IT ORDAINED BY THE BOARD:

Section 1. The "South Florida Building Code" attached to this ordinance as Exhibit A and made a part hereof is hereby adopted as the building code for both the incorporated and unincorporated areas of Dade County, Florida.

Section 2. Any reference in this Building Code to "building official" is hereby changed to "Director of the Dade County Zoning and Building Department" and any reference in this Code to "appointing authority" or "legislative authority" is hereby changed to "Board of County Commissioners."

Section 3. If any section, subsection, sentence, clause, provision, or part of this ordinance, including the Exhibit attached hereto and made a part hereof, shall be held invalid for any reason, the remainder of this ordinance shall not be affected thereby but shall remain in full force and effect.

Section 4. All county and municipal ordinances, county and municipal resolutions, municipal charters, special laws applying to this county and general laws applying only to this county or any general law which this commission is specifically authorized by the Constitution to supersede, nullify or amend, or any part of any such ordinance, resolution, charter or law in conflict with any provision contained herein are hereby repealed.

Section 5. This ordinance shall become effective December 31, 1957.

PASSED AND ADOPTED OCTOBER 29, 1957.

PART I
ADMINISTRATIVE

CHAPTER 1
TITLE AND SCOPE

101 Title
102 Purpose
103 Scope
104 Application to Existing Buildings
105 Maintenance of Buildings and Property

---

101 TITLE

This compilation of rules shall be known as "The South Florida Building Code," may be cited as such, or as the "Building Code" (prefixing the name of the legislative body adopting it by ordinance) and will be referred to hereinafter as "this Code."

102 PURPOSE

The purpose of this Code is to provide certain minimum standards, provisions and requirements for safe and stable design, methods of construction and uses of materials in buildings and/or structures hereafter erected, constructed, enlarged, altered, repaired, moved, converted to other uses or demolished, to provide for the safety of workers and others during these operations and to regulate the equipment, materials, use and occupancy of all buildings and/or structures. The provisions of this Code shall be deemed to supplement any and all State laws of the State of Florida relating to building.

Amended 19 February 1962

Chapter 28
Steel and Iron

2801 General
2802 Material
2803 Design Loads
2804 Minimum Thickness of Material
2805 Connections
2806 Pipe Columns
2807 Protection of Metal
2808 Open-Web Steel Joists
2809 Light-Gage-Steel Construction

2801 General

2801.1 Design: Steel and iron members shall be designed by methods admitting of rational analysis according to established principes of mechanics.

2801.2 Scope: The design, fabrication and erection of steel and iron for buildings and other structures shall be as set forth in this chapter. The requirements set forth in Sections 2801 through 2807, inclusive herein, are applicable to structural steel for buildings and other structures and do not apply to steel joints, members formed of flat-rolled sheet or strip steel, light-gage-steel construction, skylights, marquees (except structural frame) or other miscellaneous light-steel construction.

Manual of Steel Construction

SIXTH EDITION

First Revised Printing
Price: $7.00

American Institute of Steel Construction, Inc.
101 Park Avenue, New York 17, N. Y.
(SEAL)

1.23.8 TOLERANCES

1.23.8.1 STRAIGHTNESS

Structural members consisting primarily of a single rolled shape shall, unless otherwise specified, be straight within the appropriate tolerances allowed by ASTM Specification A6 or as prescribed in the following paragraph. Built-up structural members fabricated by riveting or welding, unless otherwise specified, shall be straight within the tolerances allowed for wide flange shapes by ASTM Specification A6 or by the requirements of the following paragraph.

Compression members shall not deviate from straightness by more than 1/1000 of the axial length between points which are to be laterally supported.

Completed members shall be free from twists, bends and open joints. Sharp kinks or bends shall be cause for rejection of material.

(h) TOLERANCES

Some variation is to be expected in the finished overall dimensions of structural steel frames. Unless otherwise specified, such variations are deemed to be within the limits of good practice when they are not in excess of the accumulative effect of the fabricating tolerances for finished parts permitted in Sect. 1.23.8 of the AISC Specification for the Design, Fabrication and Erection of Structural

Steel for Buildings, and the rolling tolerances for profie dimensions permitted under ASTM Specification A6, General Requirements for Delivery of Rolled Plates, Shapes, Sheet Piling and Bars for Structural Use.

In the erection of structural steel for structures other than bridges and multi-story tier buildings and individual pieces are considered plumb, level and aligned if the error does not exceed 1:500.

Building Failures

Case Studies in Construction and Design

THOMAS H. MCKAIG
Consulting Esgineers

MCGRAW-HILL BOOK COMPANY (1962)
New York Toronto London

BROOKLYN THEATER—BROOKLYN, N. Y.

A typical instance of a structure that, if properly braced, would have been perfectly safe, was the Brooklyn Theater,[38] which failed November 29, 1921, causing the death of seven men. The building, about 80 x 160 ft in plan of the main portion, was designed for a seating capacity of about 1,800.

[Drawing not reproduced for Supreme Court]

Fig. 3.6. Approximate plan of Brooklyn Theater before collapse

The transverse trusses, 1 through 8 in Fig. 3.6, were spaced about 16 ft on centers, and over the top of the trusses were 6-in. channel purlins, cantilevered out about 20 in. as shown to pick up short purlins on a simple span. Over the trusses was the roof of reinforced clay tile. Four of the eight trusses were carried on brick piers built integral with the wall. Three of the others (Fig. 3.7) were carried on top of a longitudinal truss (Fig. 3.8), truss 1 being supported on a double strut to the top of the column which carried the longitudinal truss.

Apparently the only faulty design, aside from the lack of bracing, lay in the fact that this main column was not anchored to the concrete footing. Although holes were provided in the base plates of the transverse trusses, they were not anchored to the pilasters on which they were carried. There was no diagonal bracing whatsoever between the trusses and there was one line of strut bracing near the center of the lower chord.

Investigation showed that the collapse had been precipitated by the base of the main column kicking out, dropping

[Drawings not reproduced for Supreme Court]

Fig. 3.7. Side elevation of lateral trusses of Brooklyn Theater

Fig. 3.8. Side elevation of longitudinal truss of Brooklyn Theater

all of the trusses so that they lay in the position shown in Fig. 3.9. Apparently the trusses went down in pairs, as tied together by the purlins (Fig. 3.10). The pilaster which held the end of the longitudinal truss was broken, but the end of the truss remained in place. The wall of the offset fell, and one other pilaster, as shown on the plan, (Fig. 3.9) was broken. All of the other pilasters remained intact and the trusses slid off the bearing plates. The double angle strut, which supported truss 1, was bent double with the back of the angles against each other. The trusses scraped the inside of the pilaster while falling in only three places in the building. In all others, the end of the truss fell completely clear of the wall. In general, very few of the main members were broken in the fall, except in the web members of the trusses.

It is difficult to determine what triggered the failure. There was some indication that the failure of the pilaster at the north end of column 5 may have caused a slight jolt which kicked the column out at the far end of the longitudinal truss, or it may have been that some extraneous cause brought about a vibration which jolted the column and caused the collapse.

LIBRARY
SUPREME COURT, U. S.

FILED
JAN 15 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 835

D. H. OVERMYER WAREHOUSE CO., INC., an Ohio Corporation, GREEN & WHITE CONSTRUCTION CO., INC., a Delaware Corporation, and LIBERTY MUTUAL INSURANCE CO., a Massachusetts Corporation,
Petitioners,

vs.

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Respondent.

BRIEF OF FLORIDA STEEL CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, MIAMI, FLORIDA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. .....

D. H. OVERMYER WAREHOUSE CO., INC., an Ohio Corporation, GREEN & WHITE CONSTRUCTION CO., INC., a Delaware Corporation, and LIBERTY MUTUAL INSURANCE CO., a Massachusetts Corporation,
Petitioners,

vs.

FLORIDA STEEL CORPORATION, a Florida Corporation,
Respondent.

BRIEF OF FLORIDA STEEL CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, MIAMI, FLORIDA

INTRODUCTION

This brief is filed on behalf of the respondent, Florida Steel Corporation, in opposition to the petition for writ of certiorari filed in this Court by the petitioners, D. H.

Overmyer Warehouse Co., Inc., an Ohio corporation, Green & White Construction, Inc., a Delaware corporation, and Liberty Mutual Insurance Co., a Massachusetts corporation.

The petitioners, in toto, will be referred to in this brief as "petitioners," and the respondent, Florida Steel Corporation, will be referred to as "respondent." References to the appendix accompanying this brief will be by the symbol "App." References to the original record, which has been transmitted by the Clerk of the District Court of Appeal of Florida, Third District, to this Court, shall be by the symbol "R."

The petitioners seek to have this Court grant a writ of certiorari to the District Court of Appeal of Florida, Third District, on the grounds that they have been denied a State and Federal Constitutional right of due process and equal protection of the law.

Your respondent recovered a money judgment against the petitioners in a suit instituted in the Circuit Court of Dade County, Florida. Petitioners prosecuted an appeal of the final judgment to the District Court of Appeal of Florida, Third District, from said final judgment. The District Court of Appeal of Florida, Third District, dismissed petitioners' appeal as being frivolous and it is from this order of the District Court of Appeal of Florida, Third District, that the petitioners have filed their petition for writ of certiorari.

Respondent believes that a more detailed review of the facts of this case, as outlined in the record, is necessary in order to demonstrate that there is no basis for the issuance by this Court of a writ of certiorari.

STATEMENT OF FACTS

The respondent, Florida Steel Corporation, had been a materials supplier of steel joist products to a warehouse being erected by petitioner Green & White Construction Co., Inc., for petitioner D. H. Overmyer Warehouse Co., Inc. When Florida Steel's bill was not paid for the fabricated steel joists which had been furnished, it filed mechanic's liens under the Florida Mechanic's Lien Statute and thereafter instituted a suit to foreclose the mechanic's lien (R 1-11).

Under applicable Florida statute the claim of lien of Florida Steel Corporation was transferred to a bond upon which petitioner Liberty Mutual Insurance Co. was surety. By reason of the posting of this bond Liberty Mutual Insurance Co., along with D. H. Overmyer Warehouse Co., Inc., and Green & White Construction Co., Inc., became a principal defendant and a joint and several judgment was entered against each of said named parties (R 88-89).

No court reporter was present at the trial before the trial judge. There was, therefore, no transcript of the testimony that had been presented to the trial judge. Under applicable Florida procedural rules the trial judge entered an order certifying to a summary of the testimony which had been presented to him, which formed the basis of the record on appeal (See App. A1-A5; R 87(a)-87(d)).

At a pretrial conference held before the trial judge, the petitioners herein (defendants in the trial court), admitted the contract between the parties, admitted that Florida Steel performed the contract, and admitted that the amount claimed to be due was proper (See App. A5; R 53-54). At the pretrial conference, held four

days prior to the trial date, the petitioners herein for the first time moved to amend their answer to raise a question that the materials supplied by Florida Steel were defective. The request for amendment was granted by the trial court and the case actually went to trial on the question of whether or not the materials delivered by Florida Steel were defective. No claim was ever asserted by the petitioners herein in the trial court that the materials delivered by Florida Steel were not in compliance with any Metropoliitan Dade County, Florida building ordinance, nor did the petitioners offer any proof in the trial court of any ordinances of Metropolitan Dade County, Florida.

The petitioners' brief in the District Court of Appeal of Florida, Third District. was directed solely to the issue that the fabricated steel that had been furnished by Florida Steel Corporation was not in compliance with the building code of Metropolitan Dade County. Attached to the brief was the South Florida Building Code as adopted by the Board of County Commissioners of Dade County, Florida, a Manual of Steel Construction published by the American Institute of Steel Construction, Inc., and excerpts from a book entitled Building Failures—Case Studies in Construction and Design, by Thomas H. McKaig. None of these exhibits had been offered in evidence before the trial court, nor was the issue of the applicability of the South Florida Building Code (a municipal ordinance), ever presented to the trial court.

The respondent, as appellee in the District Court of Appeal of Florida, Third District, pursuant to Florida Appellate Rule 3.9, filed a motion to strike appellants' brief. Rule 3.9 is set out in App. A6. The motion to strike pointed out that the exhibits attached to the brief of the petitioners (appellants in the District Court of Ap-

peal) were dehors the record in the trial court and therefore should not be considered by the District Court of Appeal on review of the final judgment of the trial court (App. A6).

The District Court of Appeal considered the motion to strike and struck the exhibits which were attached to the brief of the appellants (petitioners herein) (App. A7; R 96).

The appellants (petitioners herein) did not deem it appropriate to file a new brief after the District Court of Appeal had stricken the exhibits attached to their brief. The respondent herein (appellee in the District Court of Appeal) then filed its brief directed to the merits of the cause, in which it was pointed out that the order of the trial judge certifying a summary of the testimony for the record on appeal (App. A1-A5; R 87(a)-87(d)) established the following:

> (a) That the petitioners herein (defendants in the trial court) did not dispute the amount claimed to be due by Florida Steel;
>
> (b) That the petitioners herein (defendants in the trial court) did not dispute that Florida Steel had complied with all of the requirements of the Florida Mechanic's Lien Statute;
>
> (c) That the petitioners herein (defendants in the trial court) had never made any complaint to Florida Steel prior to the amendment of their answer four days prior to trial that the fabricated steel joists delivered by Florida Steel to the job site were in any way defective;
>
> (e) That all of the inspections of the steel joists made by the expert witnesses of the petitioners herein (defendants in the trial court) were made long after

the material had been delivered, the warehouse completed and occupied by D. H. Overmyer Warehouse Co., Inc. (App. A1-A5; R 87(a)-87(d)); and

(f) There was conflict in the testimony of the experts as to whether or not there were even any defects at all and the cause of such defects. At best, the examination of the experts testifying in behalf of the petitioners (defendants in the trial court) was a cursory examination from the floor of the warehouse.

The petitioners herein (appellants in the District Court of Appeal) did not file a reply brief to the brief filed by the appellee (respondent herein) in the District Court of Appeal. The District Court of Appeal, faced with this state of the record and the briefs before it, re-examined the case and entered the following order:

"The court having examined the briefs submitted and it appearing that the court has heretofore considered a motion of the appellee to strike appellants' brief and has stricken the exhibits attached thereto as not being a part of the record on appeal, and it further appearing that inasmuch as said exhibits are not a part of the record on appeal, the points presented upon appeal may not be considered by the court; therefore, the appeal is frivolous, whereupon, this appeal is quashed." (R 98)

Petitioners herein filed a petition for rehearing in the District Court of Appeal, which was denied (R 99). The petitioners then filed a petition for writ of certiorari in the Supreme Court of Florida, which was denied (R 105), and thereafter filed a petition for rehearing in the Supreme Court of Florida, which was also denied (R. 106).

THE QUESTION PRESENTED

Has the District Court of Appeal of Florida, Third District, Unconstitutionally Denied the Petitioners the Right of Appeal Guaranteed by the Florida Constitution and Thereby Denied the Petitioners Their Constitutional Right to Due Process of Law and Equal Protection?

ARGUMENT

It is respectfully submitted that this petition for a writ of certiorari is equally as frivolous as the appeal which was dismissed by the District Court of Appeal of Florida, Third District. It is elementary that an appellant in any appellate proceeding must present some kind of a justiciable controversy to the appellate court for its review. The appellant has the duty of demonstrating that the trial court has in some way committed error, either in fact or in law.

It is the rule of the Florida courts, as well as the general rule of appellate procedure in this Court, that the appellate court will confine the parties to points raised and determined in the trial court and will not permit parties to raise points or grounds for the first time in the appellate court. *Hartford Fire Ins. Co.* v. *Hollis* (1909), 58 Fla. 268, 50 So. 985; *Jaffe* v. *Endure-A-Life Time Awning Sales, Inc.* (1957, Fla. Supreme Court), 98 So. 2d 77; 2 Fla. Jur., Appeals, § 290, page 629. Neither will the court grant trial de novo to the appellant. *State ex rel. Cartmel* v. *Aetna Casualty & Surety Co.* (1922, Fla. Supreme Court), 84 Fla. 123, 92 So. 871, 24 ALR 1262; and *Fote* v. *Moyer* (1953, Fla. Supreme Court), 63 So. 2d 622. The appellate court is also confined in its review to the record produced on appeal. *Maistrosky* v. *Harvey* (1961, Fla. App.), 133 So. 2d 103.

As heretofore pointed out, Florida Appellate Rule 3.9(b) specifically authorizes the quashing of an appeal on the ground that it is frivolous.

This Court has recognized the validity of such a rule in the case of *U. S.* v. *Johnson* (1946), 66 S.Ct. 464, 327 U.S. 106, 90 L.Ed. 562, in which this Court said:

> "The appeal to the Circuit Court of Appeals was instituted by notice of appeal under Rule III of the Criminal Appeals Rules. Rule IV gives the Circuit Court of Appeals power to supervise and control all proceedings on the appeal and to expedite such proceedings by, among other things, entertaining motions to dismiss. Ray v. United States, 301 U.S. 158, 164, 57 S.Ct. 700, 703, 81 L.Ed. 976; Mortensen v. United States, 322 U.S. 369, 64 S.Ct. 1037, 88 L.Ed. 1331. Under that Rule the Circuit Court of Appeals here after studying the issues raised and upon determining that the only objection was to the trial court's findings on conflicting evidence, should have decided that this does not present a reviewable issue of law and on its own motion have dismissed the appeal as frivolous.[6]" (Citing many authorities in the footnote.)

It is petitioners' contention that they have been denied their constitutional rights of due process and equal protection of the law because the District Court of Appeal of Florida, Third District, quashed their appeal as being frivolous. The petitioners' entire brief in the District Court of Appeal was directed to an examination of the building code, which is a municipal ordinance, the specifications of the American Institute of Steel Construction, which is referred to in the building code, and excerpts from a book entitled Building Failures—Case Studies in Construction and Design.

It is the law of Florida that a court cannot take judicial notice of municipal ordinances. As was stated in the case

of *Conrad* v. *Jackson* (1958, Supreme Court of Florida), 107 So. 2d 369, in speaking of the necessity of offering proof of municipal ordinances—

> "It is necessary that we point up a deficiency in the proofs with reference to the zoning ordinance. Nowhere in the record do we find that the municipal zoning ordinance was ever placed in evidence. The parties refer to it and liberally quote from it in their briefs. In other respects, save for the opinion of the Chancellor, this court is completely in the dark as to the content of the ordinance. It simply does not appear in the record. The established rule is that courts cannot take judicial cognizance of municipal ordinances. We consequently cannot inquire into the provisions of an ordinance which is not before us. Stephens v. Anderson, 75 Fla. 575, 79 So. 205; State ex rel. Kay v. City of Miami, 158 Fla. 26, 27 So.2d 413."

which has been followed by the District Court of Appeal of Florida, Third District, in *Town of Medley* v. *Caplan* (1966, Fla. App.), 191 So. 2d 449.

The record in this cause being totally devoid of any showing that the South Florida Building Code (the ordinance in question) had even been mentioned in the trial court, much less properly offered in evidence, the District Court of Appeal of Florida, Third District, had no choice but to strike the unauthorized exhibits the petitioners herein had attempted to attach to their brief. The petitioners herein did not choose to file an additional or supplemental brief before the District Court of Appeal, but chose to let the matter rest in that court on the brief they had originally filed.

The entire brief of the petitioners herein (appellants in the District Court of Appeal) was bottomed on their argument that steel joists delivered by Florida Steel (respondent herein) violated the South Florida Building Code, which building code had not been offered in evidence in the trial court.

The building code not being a part of the record in the cause, nor having been mentioned or presented as a defense in the trial court, there was no demonstration by the appellants (petitioners herein) that the trial court had committed any error whatsoever, much less a demonstration that the trial court had committed reversible error.

The petitioners herein claim that their constitutional rights have been violated, in that they have been denied a right of appeal by the action of the District Court of Appeal. Nothing could be further from the truth, as disclosed by this record. The petitioners were not denied a right of appeal. They had an appeal. The District Court of Appeal considered what the appellant had presented and determined that under the record and the briefs as filed that the petitioners herein (appellants in the District Court of Appeal) had wholly failed to demonstrate error and that, therefore, their appeal should be dismissed in accordance with applicable appellate rules on the ground that such appeal was frivolous.

THE CONSTITUTIONAL QUESTION

It is respectfully submitted that this case falls directly within the purview of the comments made by this Court in the case of *Corrigan* v. *Buckley*, 271 U.S. 323, 46 S.Ct. 521, 70 L.Ed. 969, in which this Court stated:

> "The mere assertion that the case is one involving the construction or application of the Constitution, and in which the construction of federal laws is drawn in question, does not, however, authorize this Court to entertain the appeal; and it is our duty to decline jurisdiction if the record does not present such a constitutional or statutory question substantial in character and properly raised below. Sugarman v. United States, 249 U.S. 182, 184, 39 S.Ct. 191, 53 L.Ed. 550; Zucht v. King, 260 U.S. 174, 176, 43 S.Ct. 24, 67 L.Ed. 194. And under well settled rules, jurisdiction is wanting if such questions are so unsub-

stantial as to be plainly without color of merit and frivolous. Wilson v. North Carolina, 169 U.S. 586, 595, 18 S.Ct. 435, 42 L.Ed. 865; Delmar Jockey Club v. Missouri, 210 U.S. 324, 335, 28 S.Ct. 732, 52 L.Ed. 1080; Binderup v. Pathé Exchange, 263 U.S. 291, 305, 44 S.Ct. 96, 68 L.Ed. 308; Moore v. New York Cotton Exchange, 270 U.S. 593, 46 S.Ct. 367, 70 L.Ed. 750, No. 200, decided April 12, 1926."

CONCLUSION

It is respectfully submitted that the record in this cause clearly demonstrates that the petitioners herein have been given a full and fair opportunity to present their defenses in the trial court and to present their case to the District Court of Appeal of Florida, Third District. The problem the petitioners herein encountered in the District Court of Appeal is the same problem, it is respectfully submitted, that they face in this proceeding, that is, that there is no substance to their claim and the same has all the earmarks of being frivolous.

The petitioners have wholly failed to demonstrate any violation of their constitutional rights of due process and equal protection.

It is respectfully submitted that the question presented by the petitioners is so insubstantial as to be plainly without color of merit and is frivolous, and that this Court should, therefore, deny jurisdiction.

Respectfully submitted,

ROBERT C. WARD
Attorney for Respondent
SIBLEY, GIBLIN, LEVENSON & WARD
605 Lincoln Road
Miami Beach, Florida 33139
Of Counsel

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the above and foregoing brief was furnished to the following:

Cotton Howell, Esquire
Shutts and Bowen
First National Bank Building
Miami, Florida
Attorney for Petitioners

Russell Morton Brown, Esquire
Brown, Goodpasture & Block
Federal Bar Building
Washington, D. C.
Attorney for Petitioners

by mail, by depositing the same in a United States mail box, with first class postage prepaid affixed, appropriately addressed, to the foregoing counsel for the petitioners, on the ..... day of January, 1969.

.....

ROBERT C. WARD

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

ORDER CERTIFYING SUMMARY OF TESTIMONY FOR RECORD ON APPEAL

This cause came on for hearing on motion of the defendants to certify summary of testimony for record on appeal and it appearing to the Court that the respective parties hereto have filed proposed summary of testimony and the Court having considered said summaries and made findings where the proposed summaries were not in accord, the Court finds that the following summary of testimony is the true and correct testimony taken at the trial of this cause on Thursday, September 28, 1967:

PLAINTIFF'S WITNESSES

1. JAMES E. VINCENT, Sales Manager of plaintiff, testified that the amount due, including extras, was $23,-243.78, and that the interest to the date of trial was $1,019.00. He further testified that no complaints were made by defendants regarding any defects in the material, or any objections to the invoices.

2. JOSEPH G. ROGERS, Credit Manager of plaintiff, also gave the amount of the account, plus interest due and stated that demand had been made for payment, but that no payment had been made. He also testified that no objections had ever been made to the invoices covering the account.

3. WALTER G. STEPHAN was qualified as an expert engineer. He was formerly an inspector for Dade

County, Florida. He examined the joists on Wednesday, September 20, 1967. He stated that he saw all the joists involved, and used a ladder to make a close inspection. He further stated that the joists were in good shape, and had no defects.

On cross-examination, he stated that some of the joists were bowed, but stated that the curves were not more than one inch, which he states is the accepted standard of tolerance for this kind of joists. He also stated that it was not important to keep the joists in a straight line, as long as the bottom and top beams are bowed together.

4. FRED A. WHITEHEAD, Superintendent in charge of erection of the joists done by subcontractor, M. R. Harrison Construction Co. He stated that he examined the joists before and after they were installed, that he supervised the installation of said joists, and that there were no defects either before or after installation. He further stated that personnel of Green and White Construction Company, the general contractor, inspected the joists after they were installed, and that no complaints were made. He also stated that an engineer employed by the construction company inspected the joists after installation, and that no complaints were made.

5. MORT PODELL was qualified as an expert attorney and testified that in his opinion a reasonable fee for services to counsel for plaintiff in this case would be between $4500 and $5500.

6. SHALLE S. FINE was qualified as an expert attorney, and testified that in his opinion a reasonable fee for services to counsel for plaintiff in this case would be between $5000 and $6000.

DEFENDANTS' WITNESSES

1. The defendants admitted that the plaintiff complied with all the requirements of the Mechanic's Lien Statute, and waived all proof thereof.

2. PAUL E. KORNMAN, 4212 Wisconsin Avenue, Tampa, Florida, was qualified as an expert professional engineer. He is a professional engineer licensed in Florida and thirty-five other states. During the material period herein, he was a consulting engineer for the defendant, D. H. Overmyer Warehouse Company.

He examined the joists involved in this dispute in June of 1967, and shortly before the trial. His method of inspection was by looking up from the ground and making a visual inspection. He found ninety-three of the joists were defective. The defects consisted of the following: (a) some were not vertical, that is the lower steel beam was not in line with the upper beam of the joists, (b) the ends were bent, and (c) the joists were bowed. He testified that the defects could have been caused by fabrication error or an erection error, but that in his opinion the defects enumerated were fabrication defects and not erection defects. He was then asked, on direct, whether he knew what the cost of properly repairing said defects would be. Counsel for the plaintiff objected on the grounds that the witness was not qualified as an expert as to repair costs. The trial court reserved ruling on the objection and the witness testified that he had a "guess" as to what the repair cost would be. Counsel for plaintiff objected to that on the grounds that a mere guess would be speculative, irrelevant and immaterial. The trial court permitted the witness to answer the question. The witness testified that the cost of properly repairing said defects would be $50 per joist, or a total of $4650.

3. WILLIAM J. NIXON, 1437 Overlea Drive, Clearwater, Florida, was qualified as an expert in general construction. He acted as a consultant in the job in controversy for D. H. Overmyer Warehouse Company. He examined the joists in dispute in August 1967. He testified that the tails of the bar joists were hooked resulting in the bottom chord of the joists being out of vertical alignment with the top chord, and thereby creating a possible structural failure. He stated that the difference of one inch out of vertical alignment could cause failure on these jobs. He stated that the joists were defective in that they were out of plumb, and were bowed; and that in his opinion the defects were fabrication defects and not erection defects and that they could be repaired. The witness testified that he had built, or was involved in, the construction of at least 100 warehouses for D. H. Overmyer Warehouse Company, and that it was the practice in the construction of these warehouses to have an inspection of the joists before they were erected, and an inspection of the joists after the erection, and that if a defect was present at the time of erection, the fabricator or erector would be notified before or at the time the erection was finished.

4. JIM McGEHEE, 50 N.E. 181 Street, Miami, Florida, is an employee of D. H. Overmyer Warehouse Company. He testified that he examined the joists one week before the trial and could observe with his naked eye that many of the joists were out of line, bowed and bent. He also testified that a certificate of occupancy had been issued to the subject warehouse, and that the warehouse was completed in January of 1967 and was and still is being used and occupied.

5. BARRY KUTUN was qualified as an expert attorney and testified that in his opinion a reasonable fee for services to counsel for plaintiff in this case would be between $1500 and $2000.

There was no further testimony.

DONE AND ORDERED this 23rd day of January, 1968, at Miami, Dade County, Florida.

Ralph O. Cullen
Circuit Judge

EXCERPTS FROM MINUTES OF PRETRIAL CONFERENCE HELD BEFORE HONORABLE RALPH O. CULLEN, CIRCUIT JUDGE, ON SEPTEMBER 20, 1967

THE COURT: Can we stipulate that the plaintiff can have these papers identified—as to the invoices or whatever they are—and put it in evidence and then rest?

MR. HOWELL: Yes, sir. In other words, we admit the contract; that they performed under the contract; and the amount is not disputed other than—

THE COURT: The amount of the claim. There is no controversy over that?

MR. HOWELL: That is correct, other than our claim of defective material.

THE COURT: That is right.

MR. GLASER: Once we introduce the contracts and the delivery tickets—

MR. HOWELL: That is all you have to do.

MR. GLASER: That is all we have to do.

THE COURT: And have them testify that they have not been paid.

MR. GLASER: Yes, sir.

THE COURT: Then we can go right to these defenses.

MR. GLASER: The late delivery and the—

MR. HOWELL: That is right.

[Whereupon, the pretrial conference was concluded.]

FLORIDA APPELLATE RULE 3.9(b)

b. **Motion to Quash Appeal.** Where appropriate, the appellee may file with the clerk of the court, a written motion to quash the appeal on the ground that the same is frivolous or taken only for the purpose of delay.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT.

MOTION TO STRIKE

THE APPELLEE, FLORIDA STEEL CORPORATION, by and through its undersigned attorneys, respectfully moves the Court, pursuant to Rule 3.9 of the Florida Appellate Rules, for an order to strike appellants' brief and shows in support of this motion, the following:

1. The appellants' brief sought to be stricken recites matters and contains exhibits which are dehors the record.

2. The exhibits attached to the appellants' brief were not introduced into evidence at the trial below.

3. A certified copy of the index to the record on appeal is attached hereto and made a part hereof.

4. The trial in this cause was held without the presence of a court reporter, and the trial court entered an order certifying a summary of testimony for the Record-on-Appeal. A certified copy of that order is attached hereto and made a part hereof.

5. Appellate review is confined to the Record-on-Appeal and it is improper for counsel, on appeal, to insert in the brief matters and things which were not a part of the trial record, and which have not been brought to the

attention of the trial court for consideration. *Sheldon* v. *Tiernan,* 147 So. 2d 593 (Fla. 2nd D.C.A. 1962); *Florida Livestock Board* v. *Hygrade Food Products Corporation,* 141 So. 2d, 6 and 7 (Fla. 1st D.C.A. 1962); *Maistrosky* v. *Harvey,* 133 So. 2d 103, 105 (2nd D.C.A. 1961); *Kelly* v. *Kaufman,* 101 So. 2d 909, 911 (Fla. 3rd D.C.A. 1958).

SIBLEY, GIBLIN, LEVENSON & WARD
Attorneys for Appellee
605 Lincoln Road
Miami Beach, Florida 33139
By: /s/ ALLAN M. GLASER
(*Of Counsel*)

CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES that a true and correct copy of the foregoing was mailed to Shutts & Bowen, Esqs., Attorneys for Appellants, 1000 First National Bank Building, Miami, Florida 33131, on this the ..... day of March, 1968.

/s/ ALLAN M. GLASER

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1968

WEDNESDAY, MARCH 27, 1968

This cause having come on for hearing on appellee's motion to strike appellants' brief, and the court having considered same, it is ordered that said motion is granted in part, as to the challenged exhibits attached to appellants' brief and such exhibits are hereby stricken.

It is further ordered that appellee's motion to quash appeal is denied.

A True Copy

ATTEST:

/s/ William P. Carter
Clerk District Court of Appeal,
Third District

cc: Sibley, Giblin, Levenson & Ward
Shutts & Bowen
/h

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

MOTION TO QUASH

THE APPELLEE, FLORIDA STEEL CORPORATION, by and through its undersigned attorneys, respectfully moves the Court, pursuant to Rule 3.9 (b) of the Florida Appellate Rules, for an order quashing this appeal and shows in support of its motion, the following reasons:

1. This appeal presents to this Court, by virtue of appellants' brief, and assignments of error which he relies upon, the following basic question:

> Whether or not the trial court erred in rendering judgment for the plaintiff when the record affirmatively showed that the steel joists furnished violated the specifications of the Dade County Building Code.

2. The conclusions of the trial judge come before the appellate court clothed with a presumption of correctness, and the appellate court should not substitute its judgment for that of a chancellor when the record contains substantial evidence to support his conclusions. *Bowen* v. *Everett*, 205 So. 2d 536 (Fla. 2nd D.C.A. 1967); *Rose* v. *Grable*, 203 So. 2d 648, 649 (Fla. 3rd D.C.A. 1967); *Miami Beach First National*

Bank v. *Shalleck*, 182 So. 2d 649, 650 (Fla. 3rd D.C.A. 1966); *Lane* v. *Most Worshipful Union Grand Lodge, etc.*, 180 So. 2d 187, 188 (Fla. 1st D.C.A. 1965); *LaFrance Cleaners & Dyers, Inc.* v. *Argenio*, 147 So. 2d 330, 331 (Fla. 3rd D.C.A. 1962); *Bruggisser* v. *Bruggisser*, 133 So. 2d 654, 655 (Fla. 3rd D.C.A. 1961); *Bell* v. *Bell*, 81 So. 2d 536 (Fla. 1955).

3. A brief examination of the record is all that is necessary to demonstrate that this appeal is a frivolous one.

4. The trial of this cause in the lower court was held without the presence of a court reporter, and the trial court entered an order certifying a summary of testimony for the Record-on-Appeal. A certified copy of that order is attached hereto and made a part hereof. From a brief examination of that summary of testimony, which serves as the Record-on-Appeal, it is patently obvious that there was substantial competent evidence to support the entry of a final judgment in favor of the plaintiff, and that there is no merit to the sole point of law relied on for reversal by appellants and which the appellants attempt to support in their brief by facts and exhibits which are dehors the record.

SIBLEY, GIBLIN, LEVENSON & WARD
Attorneys for Appellee
605 Lincoln Road
Miami Beach, Florida 33139
By: /s/ ALLAN M. GLASER
(Of Counsel)

CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES that a true and correct copy of the above and foregoing was mailed to Shutts & Bowen, Esqs., attorneys for appellants, at 1000 First National Bank Building, Miami, Florida, 33131, on this the 4th day of March, 1968.

/s/ ALLAN M. GLASER